



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 911 OF 2013**

**VERONICAH WAITHIRA**

**EDWARD MWAURA**

**STEPHEN MUCHIRI,**

**TRUSTEE OF INTER-CHRISTIAN CHURCHES..... 1<sup>ST</sup> PLAINTIFF**

**HON. GIDION MIKE MBUVI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... DEFENDANT**

**RULING**

The plaintiff by a plaint dated 25<sup>th</sup> July 2013 avers that they are the registered owners of Land Reference NO. **Nairobi/Block 72/3074** having been allocated the land in 1998 and a certificate of lease subsequently issued to them on 20<sup>th</sup> November 2001. On the parcel of land the 1<sup>st</sup> plaintiff has erected a church and permanent office buildings which are being used for worship purposes.

The plaintiff claims that on 20<sup>th</sup> July 2013 the Defendant in violation of the plaintiffs rights of ownership of the suit premises unlawfully entered the plaintiffs land premises and gave notice of the Defendant's intention to demolish the plaintiffs buildings which the Defendant claimed to be on a road reserve yet they are not. The plaintiff in the filed suit claims for an order of permanent injunction to restrain the Defendant from demolishing the plaintiff's church and buildings and general damages for the intrusion.

Simultaneously with the plaint the plaintiff filed a Notice of Motion application dated 25<sup>th</sup> July 2013 and seeks an order of interim injunction restraining the Defendant, its agents, servants and employees from entering into, alienating or taking possession of the land parcel known as **Nairobi/Block 72/3074** or destroying, demolishing or in any way interfering with the buildings erected thereon pending the hearing and determination of this suit. The plaintiff premise the application on the grounds set out on the face of the application and on the grounds contained in the supporting affidavit and supplementary affidavit of **Rev. Harrison Githiaka**. Interalia the plaintiffs have set out the following grounds to support their application for injunction:-

- i. **That the plaintiff is the registered proprietor of land parcel number Nairobi/Block,72/3074 situated in Langata Nairobi and holds a certificate of lease issued on 20<sup>th</sup> November 2011.**

- ii. **That the said land parcel is not on a road reserve.**
- iii. **That the plaintiff has erected a multi residential housing unit on the property, a church, and office buildings on the suit land.**
- iv. **That the suit land has not been compulsorily acquired by the Government.**
- v. **That the Defendant's actions are unlawful and have adversely affected the plaintiffs rights as the owner of the suit land.**
- vi. **That the demolition of the property will occasion immense suffering and inconvenience to the plaintiff and tenants of the premises and the damage cannot be compensated in monetary terms.**

The Defendant opposes the application for injunction and has filed a replying affidavit through **Mr. Thomas Gacoki** the Manager survey at the Kenya National Highways Authority.

Briefly the plaintiffs case is that the church sometime in 1989 applied to the Ministry of Lands to be allocated a plot for the development of a church. The Ministry of Lands after considering the request and after making appropriate consultations with the Nairobi City Council on 23<sup>rd</sup> December, 1998 issued a letter of allotment for plot NO. **Nairobi Block 72/1983** which by a further letter of allotment dated 1<sup>st</sup> April 2001 was extended. Following survey of the plot the plaintiff was issued with a lease and is presently the registered proprietor of land parcel **Nairobi/Block72/3074** whereat the plaintiff has constructed permanent buildings including a church and office apartments.

The plaintiffs contend that they hold a valid certificate of title that was issued to them after all the necessary procedures were complied with including survey. The plaintiffs deny that their property is on a road reserve and fault the Defendant for forcibly entering onto the property and threatening to demolish the plaintiffs buildings on the basis that the structures encroached onto the road reserve. The plaintiff aver as the legal owners of the suit property they stand to suffer irreparable damage should the Defendant carry out the threatened demolition of their place of worship and in the premises seek an order of injunction restraining the Defendant from carrying out the demolition.

The Defendant in opposition to the plaintiffs application vide the replying affidavit and further affidavit sworn by **Thomas Gacoki** states that part of the suit land falls on land that was set aside for a road reserve and Road and Railway reserve as per plan NO. **42-28-85-9** dated 5<sup>th</sup> June, 1985 annexed to the replying affidavit and marked "**KENHAI**". The Defendant avers that survey had established that part of the suit property encroached into the Defendant's road reserve which was set aside in 1957 when the project to decongest traffic in Nairobi was initiated. The Defendant contends that the structures on the suit property have impeded the construction of the Southern Bypass whose primary objective is to decongest traffic to and from the city centre by providing an alternative route for vehicular traffic on Mombasa road such that those vehicles that do not have to enter the city centre from the **Machakos/AthiRiver** side and from **Nakuru/Limuru** side can use the alternative Southern Bypass route. The Defendant states that plan NO. **FR/NO.155/30** of South Lands Estate annexed as "**KENHA 2**" shows that the suit property is partially on the Buffer Zone and that in June 1985 when the land was reserved there were no structures on the portion of the land.

The Defendant in 2003 when it determined it was ready to commence the construction of the Southern By pass issued a Gazette Notice on 6<sup>th</sup> June 2003 and a further notice on 6<sup>th</sup> August 2003 through the print media requiring all persons who had structures encroaching on the road reserve to remove them or risk their being forcibly demolished if they did not remove them. The Defendant commenced construction of the road in 2012 and contends that by virtue of section 91 of the Traffic Act the Defendant has statutory mandate to demolish any illegal structures on a road reserve. It is the Defendant's contention that the suit property Title NO. **Nairobi block 72/3074** having been illegally hived off from **Nairobi/block 72/737** which had been set aside for the communal use by the members of the Langata Southlands Residents Welfare Networking Association the plaintiff cannot claim to have a good title to the suit property. Indeed the Defendant states the Resident's Association has petitioned the National Land Commission to cancel the title to the suit property issued to the plaintiff.

The Defendant further contends that the structures put up by the plaintiff being on a road reserve it is

necessary that the same are demolished to pave the way for the construction of the Bypass for the benefit of the greater and wider public interest. The Defendant avers that the structures put up by the plaintiff have encroached onto a road reserve in contravention of **section 91** of the Traffic Act Cap 403 of the Laws of Kenya and that by virtue of **section 91 (2)** of the said Act the Defendant has the statutory mandate to remove or demolish the structures and having served the appropriate notices on the applicants the Defendant is entitled to carry on with the demolition exercise.

The plaintiff for their part contend they have not encroached onto the road reserve and aver that they were regularly allocated the suit land by the Government and were issued with a title for the parcel of land after due process and that their legally acquired property requires protection under the law. The plaintiff further contend that at any rate the road does not at any point touch their property and that the same is almost 120 metres away from the property and there is a buffer zone on which developments were demolished and that was not part of the plaintiff's property.

The parties filed written submissions which largely reiterated the facts as set out in the parties filed affidavits. The court has reviewed the affidavits and the annexures thereto and has reviewed and considered the filed submissions by the parties. The issue for the court to determine is whether on the material and evidence presented to the court the plaintiff has established and/or demonstrated that they have a prima facie case with a probability of success to enable the court to grant to the plaintiff an order of injunction.

The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favour the balance of convenience tilts.

In the present case there is no dispute that the plaintiff has a registered title on the face of it issued regularly by the Commissioner of Lands who is mandated under the law to make such allocations. The Commissioner of Lands at least before the establishment of the National Land Commission pursuant to Article 67 of the Constitution was the custodian of all Government Land and could allocate Government Land as a delegatee of the President of the Republic and it is in that capacity that the Commissioner of Lands allocated and had a title in respect of the suit property processed in favour of the plaintiff.

The title issued to the plaintiff conferred absolute rights of proprietorship and the privileges that go with ownership in terms of section 25 (1) of the Land Registration Act 2012.

**Section 25 (1) provides:-**

**The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-**

- a. **to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and**
- b. **to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

**“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a**

**transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except**

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or**
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.**

The Defendant states that the plaintiff's property sits on land that was identified way back in 1957 and planned in 1985 and was set aside for the construction of the Southern By pass and according to the Defendant these plans have been in existence. The question that begs an answer is whether the Commissioner of Lands and the Director of Surveys had any role to play in the planning and alienation of the land for the construction of the By pass and if so whether they have custody of these plans.

The Commissioner of Lands being the agent through whom all Government land is allocated and alienated would be expected to have and possess all records of all alienated and unalienated land and equally the Director of Surveys would be expected to have in his records all the survey plans of all alienated land since that is the office that approves and keeps records of all the surveys that have been undertaken. **In the instant case was the survey of the Southern By pass available at the Director of Surveys office when title was issued to the plaintiff?** It is difficult to tell since the same office approved the survey for the suit property and recommended to the Commissioner of Lands for the title to be issued.

If the Survey records relating to the alienation of the Land for the construction of the Southern By pass was unavailable at the Commissioner of Lands and the Director of Surveys office it would not have been possible for the plaintiff to know that the plot had encroached onto a road reserve. The plaintiff merely applied to be allocated a plot to construct a place of worship and though the allotment was initially made in 1998 the title was not processed until 2001 after formal survey was carried out and all payments were made by the plaintiff. There is no evidence that there was any fraud on the part of the plaintiff and neither is there anything to suggest any illegality and/or any flaw in the process and procedure of issuing the title to the plaintiff.

The plaintiffs have fully developed the suit property in accordance with the development condition in the lease and contends that pursuant to **Article 40 of the constitution** they are entitled to protection of their property and in particular they should not be arbitrarily deprived of their property unless such deprivation is done in accordance with the law and in compliance with the constitution and they are promptly compensated for the property. Article 40 (3) of the constitution provides as follows:-

**40. (3) The state shall not deprive a person of property of any description, or of any interest in or right over, property of any description, unless the deprivation-**

**(a) results from an acquisition of land or an interest in or a conversion of an interest in land or title to land, in accordance with chapter five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this constitution and any act of parliament that-**

**(i) requires prompt payment in full, of just compensation to the person and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

The only limitation to the protective rights to property conferred under article 40 of the constitution is where there has been found that the property was unlawfully acquired.

Article 40 (6) of the constitution provides:-

The rights under this article do not extend to any property that has been found to have been unlawfully acquired.

The Defendant has argued and asserted that the plaintiffs title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act section 26 (1) that provide for the indefeasibility of title and Article 40 (6) of the constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

This court in decision it rendered in the case of **EUNICE GRACE NJAMBI KAMAU & ANOTHER – VS- ATTORNEY GENERAL & 5 OTHERS (HC ELC NO. 976 OF 2012 (2013) eKL** and in which it considered and distinguished the decision by **Lady Justice Mumbi Ngugi** in the case of **CYCAD PROPERTIES LTD –VS- The A.G. & Others HC Petition NO. 70 of 2010** consolidated with **Elizabeth Wambui Githinji & others –vs- The Urban Road authority & 3 others H.C Petition NO. 69 of 2010** which the Defendant has cited to the court on the issue of sanctity of title vis-à-vis the historical acquisition of land had occasion to consider sanctity of title in the context of the provisions of the Land Registration Act and the Constitution.

In the **Grace Njambi Kamau** case (*supra*) expressed myself thus:-

**“33. Whereas various land commissions such as the Njonjo Land Commission and the Ndungu Land Commission have in their reports documented what they referred to as land grabbing and/or the acquisition of title to land illegally and unlawfully there is no definite definition of who a land grabber is and what constitutes an illegal and/or an unlawful title. In my view the determination whether a title is illegal or unlawful has to take into account the circumstances and the process through which the title was obtained and/or acquired and provided the title is regularly issued by the duly authorized officers entitled to do so by the Government, it is my opinion that such title can only be impugned under Article 40 (6) of the constitution by it being established that the title was unlawfully obtained or acquired by the person shown to be registered as the owner. The doctrine of the sanctity of title is anchored on the premises that a registered owner of land who hold a certificate of title that is duly registered is prima facie the owner of that property and the title he holds is indefeasible unless the title is shown to have been unlawfully acquired and/or procured. My understanding is that for the title of a registered owner to be impugned on account of fraud such an owner must have had knowledge that the title was fraudulently obtained or procured and/or the owner was party to the fraud”.**

In a further case **HC ELC NO. 480 OF 2011 Virenda Ramji Gudka & 3 others – vs- The Attorney General** where the facts were not any different from the facts in the present case as the defendant had challenged the plaintiffs title on the basis that the title was irregularly obtained in view of the fact that the land had been set aside for the construction of the Eastern Bypass this court while upholding the plaintiff’s title in a judgment rendered on **14<sup>th</sup> February 2014** rendered itself thus:-

**“The Defendant has neither alleged any fraud or misrepresentation on the part of the 1<sup>st</sup> plaintiff and none has been shown or proved. The 1<sup>st</sup> plaintiff has demonstrated how he acquired the land and it is my finding and holding that no illegality has been shown and neither has it been established that the title was acquired by the 1<sup>st</sup> plaintiff’s unprocedurally or through a corrupt scheme. I hold the 1<sup>st</sup> plaintiff’s title to be absolute and indefeasible and deserving protection under Article 40 of the constitution. The Defendant has not established that the 1<sup>st</sup> plaintiff’s title would be one that would fall within the provision of Article 40 (6) where protection where protection would be denied under the constitution on the basis that the property is found to have**

**been unlawfully acquired”.**

The Defendant in the instant case has sought to rely on the provisions of section 91 of the Traffic Act Cap 403 Laws of Kenya which criminalises encroachment on a road or any land reserved for a road. The Defendant submits that to the extent that the plaintiffs structures have been found to be on the path of the road the same are for demolition. With respect, this argument ignores the fact that the plaintiff holds a registered title to the parcel of land he occupies. One cannot encroach onto his own land and in my view the plaintiffs in the present suit would have a valid defence to a charge of encroachment onto a road reserve. The Defendant in my own opinion could only impugn the plaintiffs title under the provisions of the Constitution and the Registration of Land Act and cannot lawfully descend on the plaintiffs property and declare that it is on a road reserve and effect the demolitions. The plaintiffs are entitled to observance of due process to have their title cancelled, revoked and/or annulled. The Defendant did not follow due process to have the plaintiffs title impugned for any reason.

In the premises having regard to all the material presented by the plaintiff and the Defendant, I am satisfied the plaintiff has established that they have *prima facie* case with a probability of success. The plaintiffs case meets the threshold of what constitutes a *prima facie* case as defined by **Bosire, JJA in Mrao Limited – vs- First American Bank (2003) KLR 125** where he stated as follows:

**“I would say that in civil cases it is a case in which on the material presented to the court or a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

The plaintiffs have demonstrated they are the registered owners of the suit property having been regularly allocated and issued with a title. *Prima facie* their title is indefeasible and the burden shifts to the Defendant to show or demonstrate that the title is challengeable within the provisions of the law. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the plaintiffs title but the mere proof that the plaintiffs hold a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the plaintiff has established that there is a *prima facie* case.

On the second limb as to whether the plaintiff has demonstrated they stand to suffer irreparable damage that cannot be compensated in damages in case the injunction is not granted the court has to consider the rival arguments by the parties. The plaintiff argues that the church built on the suit property is used by the public as a place of worship and thus irreparable damage would be suffered as the congregation would have no house of worship to carry out their worship services if the church is demolished. Additionally the plaintiffs argue that there are tenants who occupy the other outbuildings and their tenancies would be disrupted to their prejudice if the demolitions are carried out.

For their part the Defendant argue that the demolitions are necessary in order to complete the construction of the Southern Bypass which would serve the public at large and in particular serve to decongest the city centre which lately has continued to suffer unrepresented traffic snarl ups and congestion. There is therefore what can be described as competing interests both of a public nature save and except that the Defendant’s position would appear to represent greater public interest. The plaintiffs interest is both private and public to the extent that the suit property is privately owned and registered but being utilized to serve the members of inter- Christian Churches Denomination of Nairobi who would constitute a section of the members of the public.

In essence the Defendant’s argument is that the plaintiffs suit property is required for a public purpose and the Defendant’s submission is that the land had been reserved for that purpose and the plaintiffs should not stand in the way. However as observed above the plaintiff has acquired what on the face of it is a valid title to the property they occupy which cannot be taken away from them unless the law is complied with. If the Government through the Defendant considers that they require the plaintiffs land or indeed any other land for a public purpose the Government is obliged to comply with the provisions of **Article 40 (3) (b) of the Constitution** that require that the affected party is paid prompt and just compensation for his property. Thus it does appear to me that the options that the Defendant has in this

matter is either to seek the cancellation, revocation and/or nullification of the plaintiffs title to the suit property or to set in motion the process of compulsorily acquiring and compensating the plaintiffs for their property in accordance with the law.

Although there is no doubt the plaintiffs would be greatly inconvenienced and would suffer damages if their developments on the suit property were to be demolished, my view is that the wider public would suffer more if the road, the Southern Bypass that is intended to help decongest the City Centre is stalled by reason of an injunction having been granted barring its construction. Where a parcel of land is required for a public purpose such as the construction of a road as in the instant case the National Land Commission can compulsorily acquire the land pursuant to the provisions of **Article 40 (3) of the Constitution**. Under the provisions of the Land Act NO.6 of 2012 sections 107 to 133 provide for the procedure to be followed if a property is to be compulsorily acquired.

Section 28 (e) of the Land Registration Act No. 3 of 2012 declares rights of compulsory acquisition as an overriding interest over registered Land which does not need to be noted on the register meaning that the Government through the National Land Commission can at any time compulsorily acquire any property for the purposes spelt out under Article 40 (3) of the Constitution provided the acquisition process and procedure is adhered to. It does appear to me that the plaintiffs cannot stand in the way if their property is identified as required for a public purpose as all the Government would need to do is to initiate the process of compulsory acquisition under the law.

Thus it is my view that the wider and greater public good and interest would militate against the court granting an injunction in favour of the plaintiffs who only constitute a small segment of the public compared to the other public for whom the construction of the Southern Bypass is intended. It is my consideration that the plaintiff's can be adequately compensated in damages. At the conclusion of the trial if the plaintiffs title is found to have been validly issued the plaintiffs would be entitled to full compensation as would be the case if the property was being compulsorily acquired under the appropriate provisions. I have no doubt it would be possible to obtain an appropriate valuation of the property for purposes of compensation.

The balance of convenience would be against hindering the completion of the construction of the Southern By pass, a project that has already been commenced and no doubt involves the expenditure of colossal public funds. In the premises therefore even though the plaintiffs have demonstrated a prima facie case I have come to the conclusion that the plaintiffs can infact be adequately compensated in damages and that the balance of convenience tilts against granting an injunction taking into account all the circumstances of this matter.

I accordingly for the reasons set out in the ruling decline to grant an injunction in favour of the plaintiffs and I direct that each party meets their own costs for the application.

Ruling dated signed and delivered at Nairobi this.....20th.....day of...March.....2014.

**J.M. MUTUNGI**

**JUDGE.**

**In presence of:**

.....for the 1<sup>st</sup> Plaintiff

.....for the 2<sup>nd</sup> plaintiff

.....for the defendant